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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 301

LOREN J. PIKE, as Supervisor of Inspection,
Arizona Fruit and Vegetable Standardization Service,
Appellant,

versus

BRUCE CHURCH, INC., a California corporation,
Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLANT'S BRIEF

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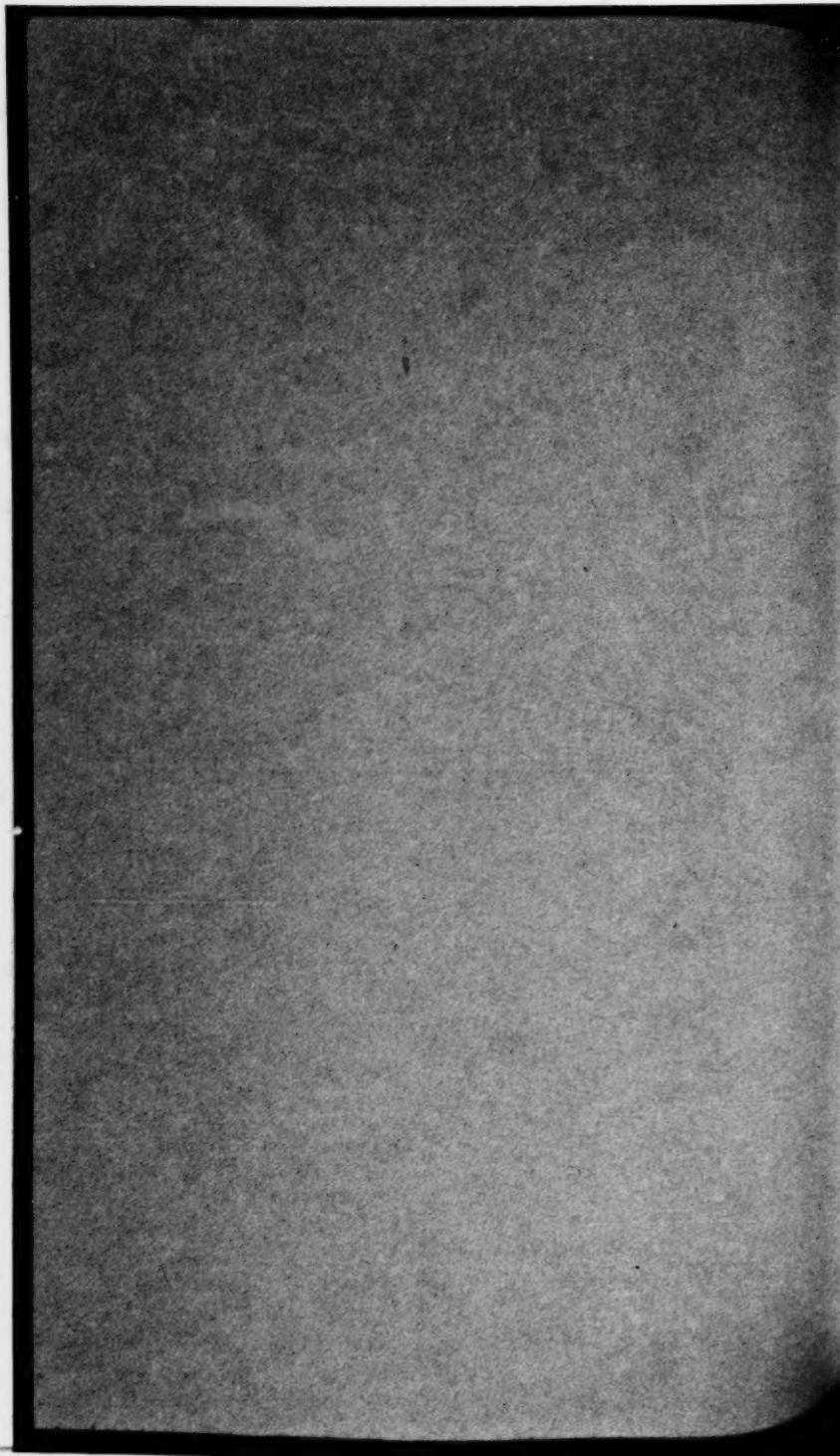

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IN THE

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APPELLANT'S BRIEF

OPINIONS BELOW

The district court's original opinion was filed on January 29, 1969. Following a Motion for Rehearing and/or Clarification filed by the appellant, the court on March 10, 1969, filed a new opinion granting the judgment from which this appeal is taken. The opinion and judgment of March 10, 1969 have not yet been officially reported. A copy of the opinion is set forth in the Appendix.

JURISDICTION

A Motion for Rehearing on the opinion and judgment filed March 10, 1969, was filed on April 1, 1969, and denied by order entered May 1, 1969. The Notice of Appeal was filed May 2,

1969. This appeal is taken from the judgment contained in the lower court's second opinion and denial of the Motion for Rehearing pertaining thereto.

This Court has jurisdiction by virtue of 28 U.S.C. § 1253.

STATUTE INVOLVED

Arizona's Fruit and Vegetable Standardization Act, Arizona Revised Statutes, Title 3, Chapter 3, Article 4, prescribes minimum standards pertaining to quality and packing for Arizona fruits and vegetables. The sections of that Act which are most relevant to the issues in this case are the following:

A.R.S. § 3-481.

Definitions

In this article, unless the context otherwise requires:

* * * * *

7. "Deceptive arrangement" or "deceptive display" means a bulk load, arrangement or display of fruits or vegetables which has in the outer layer, or exposed portion, fruits or vegetables which are so superior in quality, size or condition to any of those which are concealed, or the unexposed portion, as to materially misrepresent any of the lot.

8. "Deceptive pack" means a container of fruits or vegetables which has in the outer layer or an exposed surface, fruits or vegetables which are so superior in quality, size or condition to those in the interior of the container, or the unexposed portion, as to materially misrepresent the entire content.

A.R.S. § 3-482.

Scope of article; containers

A. All fresh fruits and vegetables, when being packed, after packing, when delivered for shipment, loaded, shipped, being transported, offered for sale or sold in this state, for which grades, standards and standard containers are established in this article, shall come within the meaning of this article.

B. All lots of fruits and vegetables packed for sale, offered for sale, transported for sale or sold in this state shall be packed in new or clean containers.

A.R.S. § 3-483.

Supervisor of inspection; appointment; oath; bond; deputies and clerks; qualifications

A. There is created the office of supervisor of inspection, hereinafter referred to as the supervisor.

B. The supervisor, who shall enforce this article, shall be appointed by and shall hold office at the pleasure of the dean of agriculture of the university of Arizona, who shall also supervise and direct the supervisor.

C. The supervisor may employ and discharge deputies and clerks as his needs may require. No person related to the supervisor by blood or marriage shall be appointed deputy or clerk.

D. The supervisor shall take and file the oath of office, and shall give a surety bond to the state for the faithful performance of his duties.

E. The supervisor and deputies shall be experienced in the inspection of fruits and vegetables and in commercial packing practices, and each shall hold, at the time of appointment, a federal fruit and vegetable inspector's license.

A.R.S. § 3-503.

Cantaloupes; definitions; serious damage; standard packs; crate markings; irregular sized container; exceptions

A. Cantaloupes shall be mature but not overripe, fairly well netted, and free from mold, decay and insect damage which has penetrated or damaged the edible portion of the cantaloupe, and free from serious damage due to bruises, sunburn, growth cracks, cuts, sponginess, flabbiness, wilting, or other causes. Damage to any one cantaloupe is not serious unless it affects the edible portion or shipping quality of the individual cantaloupe or seriously detracts from the appearance thereof. Not more than ten per cent, by count, of the cantaloupes in any one container may be below the foregoing requirements, but not to exceed one-half of this tolerance shall be allowed for any one cause. Cantaloupes packed in the standard containers shall be fairly uniform in size. All cantaloupes in each container shall be of one variety or of similar varietal characteristics.

B. "Mature", in the case of cantaloupes, means that the appearance of the outside indicates maturity and the arils which

surround the seed during the development of maturity have been absorbed and, in addition, that the juice of the edible portion shall contain not less than eight per cent soluble solids as determined by the standard hand refractometer.

C. All containers of cantaloupes shall have appearing thereon, in plain sight and in plain letters on one outside end, the name of the person who first packed or authorized the packing of the cantaloupes, or the name under which such packer is engaged in business, together with a sufficiently explicit address to permit ready location of such packer. All cantaloupes shall be packed in regular compact arrangement in closed standard containers approved by the supervisor except as follows:

1. Cantaloupes to be used for charitable purposes or unemployment relief, or by the United States government or its agencies.

2. Any retail sales directly to a consumer.

D. As used in this section, "closed" or "lidded", as applied to containers of cantaloupes, means:

1. In the case of fibreboard containers that the opening is completely covered, except for necessary ventilation openings, with material of similar quality and strength to the adjoining portion of the container.

2. In the case of nailed wooden, wirebound, or other containers, that forty per cent or more of the opening is covered with material similar to that used in the construction of the sides and bottom of such containers, securely attached to the top.

E. In addition to the markings required by subsections B, C and D, § 3-499, each container of cantaloupes shall be conspicuously marked in letters not less than one half of one inch in height, stating the exact number of melons packed therein. Added Laws 1965, Ch. 85, § 5.

QUESTIONS PRESENTED

Section 3-503, Arizona Revised Statutes, provides, *inter alia,* that with certain exceptions all cantaloupes grown in the State of Arizona and offered for sale must meet prescribed quality standards and must also be "packed in regular compact arrangement in closed standard containers approved by the supervisor. . . ." Pursuant to this statute, the appellant, who is the

"supervisor" referred to by the statute, entered an order prohibiting the appellee from shipping its cantaloupes grown at Parker, Arizona, out of the state other than in closed standard containers approved by him. The lower court has held that this order was without clear statutory basis and that it constitutes an undue burden on interstate commerce. The questions presented are:

(1) Whether, under this Court's decisions in *Federal Compress and Warehouse Co. v. McLean*, 291 U.S. 17 (1934), and *Chassaniol v. City of Greenwood*, 291 U.S. 584 (1934), the strictures of the commerce clause are even relevant, since the regulation occurs and is terminated prior to the time that the regulated goods move in interstate commerce;

(2) Whether the Arizona Fruit and Vegetable Standardization Act, as interpreted and applied by the appellant in this case, is unconstitutional as an undue burden on interstate commerce; and

(3) Whether the lower court properly held that there was no statutory basis for the appellant's order.

STATEMENT OF THE CASE

The growing of fruits and vegetables, and the marketing of these fruits and vegetables in interstate and foreign commerce, is one of the leading industries of the State of Arizona.[1] The most important legislation governing this Arizona industry is the Fruit and Vegetable Standardization Act.

The purpose of the Arizona Fruit and Vegetable Standardization Act is to preserve and enhance the reputation of Arizona fruits and vegetables in interstate and foreign commerce. The Act accomplishes this objective by requiring minimum standards of quality and pack for all produce subject to the Act. Different types of produce are subject to different requirements.

[1] According to figures compiled by the United States Department of Agriculture, the dollar value of vegetables and melons harvested in Arizona for 1967 and 1968 was $73,767,000.00 and $67,172,000.00, respectively. By dollar value, only the states of Texas, Florida and California rank higher. United States Department of Agriculture, Statistical Reporting Service, 1968 Annual Summary of Acreage, Production and Value of Principal Commercial Crops by Seasonal Groups and States.

The prototype problem with which the Act was intended to deal is set forth in the Stipulation of Facts entered into between the parties. See Appendix 26, 28. The long-run reputation which a grower of fruits and vegetables acquires is of utmost importance to the successful marketing of his fruits and vegetables from year to year. Prior to the adoption of the Fruit and Vegetable Standardization Act, however, growers in Arizona found that it was impossible to establish a reputation for quality produce in isolation from the reputation of "Arizona produce" generally. Thus, "poor quality produce shipped by one producer often had an adverse impact upon the reputation of other shippers within the State." *Id.* at 28. Arizona growers found that poor quality and slipshod packing practices emloyed by a few shippers had the effect of demeaning generally the reputation of "Arizona" fruits and vegetables. *Ibid.*

It was to remedy this dilemma and to enhance the reputation of Arizona fruits and vegetables in interstate and foreign commerce that the Arizona Fruit and Vegetable Standardization Act was enacted. By prescribing standards for produce grown in Arizona and sold in interstate and international markets, the State of Arizona hoped to eliminate the degradation of the reputation of Arizona produce by the substandard packing practices of a few.

A closely related purpose of the Act—one to which the parties have stipulated as a primary purpose[2]—was the avoidance of deceptive packs, defined by the Act as follows:

> "Deceptive pack" means a container of fruits or vegetables which has in the outer layer or an exposed surface, fruits or vegetables which are so superior in quality, size or condition to those in the interior of the container, or the unexposed portion, as to materially misrepresent the entire content. A.R.S. § 3-481 8.

The Act accomplishes its purposes by prescribing minimum standards and enforcement procedures with regard to two separate objectives. They are: (1) intrinsic soundness and quality of the

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[2]See Appendix 42-43.

produce itself, and (2) uniformity and compactness of packing. Implicit in the entire regulatory scheme is the prevention of "deceptive packs."

The uncontradicted evidence on the record is that "the Act has been successful in achieving its purpose."[3]

The value of standardizing containers for agricultural produce is also borne out by the practice of the United States Department of Agriculture. A number of Federal Marketing Orders prescribe that fruits and vegetables governed by the relevant order must be packed in standard containers.[4] Arizona does not have a Federal Marketing Order pertaining to cantaloupes.

Arizona is not alone in requiring standard containers for certain of its fruits and vegetables. Virtually every important agricultural state, with the exception of Texas, has a standardization act of some kind. The holding of the lower court that a state is power-

[3] The three leading cantaloupe producing states are California, Texas and Arizona. Arizona and California have Standardization Acts applicable to cantaloupes, and Texas does not. A comparison of the prices commanded by Arizona and California cantaloupes, on the one hand, and Texas cantaloupes on the other, further emphasizes the effectiveness of standardization laws in preserving the reputation of a State's produce. Random samples of reports of the United States Department of Agriculture's *Fresh Fruit and Vegetable Federal-State Market News* pertaining to sales of 36-per-pack cantaloupes sold in New York City reveal the following:

Date	Production Area	Price Range
	Yuma, Arizona	$12.50-$13.00
6/9/69	Imperial Valley, California	$12.00-$14.00
	Texas	$ 5.50-$10.00
	Arizona	$ 9.00
6/16/69	Imperial Valley, California	$ 9.00-$10.00
	Texas	$ 2.00-$ 8.00
	Arizona	$ 6.75-$ 8.50
6/23/69	Imperial Valley, California	$ 6.00-$ 8.00
	Texas	$ 3.00-$ 5.50

[4] See, e.g. 7 C.F.R. § 931.52 (fresh Bartlett pears grown in Oregon and Washington); 7 C.F.R. § 937.52 (nectarines grown in California); 7 C.F.R. § 1029.52 (fresh prunes grown in designated counties in Washington and in Umatilla County, Oregon).

less to prevent the shipment of its produce which does not conform to standards of quality and pack prescribed by that state's statutes casts serious doubt on the constitutionality of the enforcement of standardization laws in all states.

As to both of the objectives of the Act, the section pertaining to cantaloupes—A.R.S. § 3-503—is illustrative. Packing standards for cantaloupes are left largely to the discretion of the supervisor, the appellant in this case. The statute is explicit, however, in its command that cantaloupes must be packed in "closed standard containers approved by the supervisor." A.R.S. § 3-503 C. This mandate that all cantaloupes be packed in "closed standard containers approved by the supervisor" was part of a 1965 amendment. Prior to 1965, subsection G of A.R.S. § 3-503 provided that "No containers are established for unpacked or loose cantaloupes."

All enforcement of the Act is vested in the appellant, as Supervisor of Inspection. A.R.S. § 3-483.

Under present technology, it is not commercially feasible to sort and pack cantaloupes except in a packing shed, Gipe Deposition, 10/8-13; Transcript of Proceedings before lower court (hereinafter "Transcript"), 70/21-71/2, and inspection to determine compliance with the Standardization Act must be carried out after the cantaloupes have been sorted and packed. The sorting process involves more than the separation of the culls from the melons of acceptable quality. Sorting for uniformity of color, uniformity of size, and similar factors is also accomplished in the packing shed. Appendix 36, 39; Transcript, 70/21-71/2.

Inspection of the product in the pack lies at the heart of the Standardization Act. Unless the cantaloupes can be inspected in the pack there is no way that the appellant can determine that all cantaloupes in each container are of "one variety or of similar varietal characteristics" (A.R.S. § 3-503 A); that they are "fairly uniform in size" (*Ibid.*); that the higher quality melons have not been placed on the outside of the pack so as to constitute a "de-

ceptive pack" (A.R.S. § 3-481 8); or that they are packed in standard containers. Even as to quality requirements, *e.g.*, requirements that the cantaloupes "shall be mature but not overripe, fairly well netted, and free from mold, decay and insect damage . . ." (A.R.S. § 3-503 A), the inspection, in the language of counsel for the appellee, "best takes place at the stage of sorting, when the cantaloupes are sorted, and at the present time this can most conveniently and efficiently be done in the packing shed." Transcript, 70/21-71/2.

Upon analysis, inspection after sorting is not only the most "convenient and efficient"; inspection at any other stage would be impossible. Until the sorting has been accomplished, the culls have not been separated out from the fruit of acceptable quality; prior to sorting, therefore, it would be impossible for the inspectors to determine which fruit the shipper intended to put in the crates.

The appellee is a giant, multi-million dollar farming corporation, one of the largest fruit and vegetable growers in Arizona and California. At its Parker operation alone, the appellee has spent more than three million dollars in capital improvements in preparing some 6,400 acres of land for farming under lease from the Colorado River Indian Tribes. Appendix 31-32. In all, the appellee farms between 25,000 and 30,000 acres. *Id.* at 30.

At the present time, Bruce Church, Inc. does not have packing shed facilities at its Parker Ranch. Appendix 34. At the time this suit was filed, it had leased a packing shed in Blythe, California, some thirty miles from Parker. *Id.* at 37. The lease expired in November, 1968. *Id.* at 47. In any event, the leased facilities at Blythe will be inadequate for the appellee's anticipated acreage at Parker, and appellee intends to build its own shed either in Arizona or California. The appellee has considered the matter, but has not yet decided whether to build in Arizona or California. Gipe Deposition, 54/9-55/5. The

cost of a shed sufficient to serve appellee's anticipated acreage is approximately $200,000.00. *Id.* at 54/10. This cost is about 1/17th of the investment which Bruce Church, Inc. has already made at its Parker operation; less than 1/3rd the value of one single crop — cantaloupes — for one single year at Parker; and only 2/3rds of the net profits from one cantaloupe crop for one year. See Appendix 32 and 33 and Gipe Deposition, p. 47.

The matter of enforcement of the Act pertaining to cantaloupes came to a head in 1968. Following a controversy between the appellant and appellee concerning proposed enforcement of the Act, a bill to amend the Standardization Act was introduced in the Arizona Legislature. This bill—H.B. 170, State of Arizona, 28th Legislature, Second Regular Session—was described by Mr. David Gipe, Manager of appellee's Arizona operation, as follows:

> If this bill would have passed, it would have allowed with the Supervisor of Inspection's approval, the transporting of vegetables and melons to any point 25 miles from the state line for packing, shipment and interstate commerce. Gipe Deposition, 22/6-10.

Passage of the bill described by Mr. Gipe would, of course, have repealed both the requirement that cantaloupes must be packed in standard containers approved by the supervisor and also the requirement that the supervisor inspect for quality defects.

The bill, however, was defeated. The appellant, Mr. Pike, interpreted this defeat as a legislative mandate for enforcement of existing provisions requiring shipments only in closed standard containers. In Mr. Pike's words: "When they have tried to get this bill through the Arizona Legislature and the Legislature wouldn't pass it, I could see no other alternative for me only to enforce the law." Pike Deposition, 56/10-13.

Accordingly, the appellant sent a letter to the appellee and to

other interested shippers informing them that he would no longer permit bulk shipments of cantaloupes out of the State.[5]

The appellee reacted to the appellant's letter by filing this action, asking for declaratory judgment that the Act as interpreted and applied by the appellant was unconstitutional, and seeking injunctive relief against its enforcement as ordered by the appellant.

Following the preparation and filing of a Stipulation of Facts and the parties' briefs, the case was argued before a three-judge district court on November 15, 1968.

On January 29, 1969, the lower court filed an opinion ruling in the appellee's favor, but the ground of the ruling was unclear. The appellant filed a Motion for Rehearing and/or Clarification, and on March 10, 1969, the court filed a new decision granting the judgment from which this appeal is taken. In its second opinion, the court stated that it could find no clear basis nor authority in the statute for the appellee's order that cantaloupes not be shipped outside the state in bulk, and that in any event the order constituted an unconstitutional burden on interstate commerce.

The Notice of Appeal was filed May 2, 1969. This Court noted probable jurisdiction on October 13, 1969.

SUMMARY OF ARGUMENT

There are two separate and independent reasons why enforcement of Arizona's Fruit and Vegetable Standardization Act by re-

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[5] The content of the letter, other than formal parts, is as follows:

March 22, 1968

Various Shippers
Gentlemen:

This is to advise that no fruits and vegetables grown in the State of Arizona, that come within the meaning of the Fruit-Vegetable Standardization and Citrus Fruit Standardization laws, will be allowed to leave the State of Arizona unless they meet all the requirements as set forth in these respective laws.

Very truly yours,
L. J. Pike
Supervisor of Inspection

Defendant's Exhibit 4 to Pike Deposition.

quiring inspection of Arizona cantaloupes by Arizona inspectors in the pack does not violate the commerce clause of the United States Constitution.

The first of these is that under the decision of this Court in *Federal Compress and Warehouse Co. v. McLean*, 291 U.S. 17 (1934); *Chassaniol v. City of Greenwood, Miss.*, 291 U.S. 584 (1934); and *Parker v. Brown*, 317 U.S. 341 (1943), state regulation which is enforced solely at the packing stage is "imposed before any operation of interstate commerce occurs." *Parker v. Brown*, 317 U.S. at 361.

McLean, Chassaniol and *Parker* held that for purposes of determining the constitutionality of state regulation of goods which move in interstate commerce, the strictures of the commerce clause come into play only where the regulation is imposed at a point in time *after* the interstate journey has begun. One aspect of the challenged regulation in *McLean* and *Chassaniol*, for example,—compression of the cotton—occurred only after shipping orders for the cotton had been received, but prior to actual shipment of the cotton. Thus, the goods were already destined for interstate shipment at the time the regulation at issue was imposed, and the beginning of the interstate journey was imminent. The compression itself was the only remaining step prior to interstate shipment.

Moreover, even if the fact that the inspection here involved occurs prior to interstate shipment could be ignored, such inspection does not impose an unconstitutional burden on interstate commerce. The scope of the judicial inquiry in cases this kind is as follows:

> In the absence of [congressional] legislation the judicial function, under the commerce clause, Const. art. 1, § 8, cl. 3, as well as the Fourteenth Amendment, stops with the inquiry whether the state Legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought. *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 190 (1938).

Of particular significance to the instant case is the century-old principle of *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 298 (1851), that a distinction must be drawn between regulatory subjects which permit diversity of regulation as among the various states and those which require uniformity. Standardization of fruits and vegetables grown within a particular state clearly falls within the category which permits different states to adopt different policies. Standardization laws have their first and final impact within the regulating state. Unlike the train length requirements in *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), or the mudguard requirements in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), standardization laws do not result in a delay of the interstate journey because of differences between the laws of the various states. Following the *Cooley* distinction, therefore, they are a clear example of legislation which permits diversity.

Fruit and vegetable standardization laws differ from the usual exercise of state powers in that these laws regulate quality, uniformity of size, color and variety of products going *out* of the state rather than those coming *into* the state. The legitimacy of a state's interest in regulating the quality of its agricultural products shipped in interstate commerce has already been resolved by this Court. In *Sligh v. Kirkwood*, 237 U.S. 52 (1915), this Court upheld — against an attack on commerce clause grounds — a Florida statute prohibiting shipment of citrus fruits which were immature or otherwise unfit for human consumption.

The legitimacy of requiring standard containers is established by *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935), in which this Court considered and rejected a commerce clause challenge to the constitutionality of Oregon's laws requiring standard containers for fruits and vegetables.

The appellee's persistent atempts to fit this case within the prototype controlled by such authorities as *Baldwin v. Seelig*, 294 U.S. 511 (1935); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964); *Toomer v. Witsell*, 334 U.S. 385 (1948);

and *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928), are grounded on an erroneous and impermissible premise. The purpose of Arizona's Fruit and Vegetable Standardization Act was not to preserve the packing business for the State of Arizona, nor to insulate this State from competition of sister states. The undisputed evidence in the record and the legislative history of the Act bear out its purpose, the same purpose as approved by this Court in *Sligh v. Kirkwood*. Economic considerations underlie the Act, but they are not the anticompetitive considerations that were involved in the *Baldwin v. Seelig* line of cases. The economic goal of all standardization acts is to enhance the return to the state's growers by upgrading the reputation of the state's produce as a whole. The undisputed evidence in the record reveals that such was also the purpose of Arizona's Standardization Act. Moreover, this Court has made it very clear that Federal courts will not engage in a fruitless inquiry into the motives of state legislation where the legislature has acted within its province.

The lower court's statement that "a reading of the Act at issue reveals no clear basis nor authority for the issuance of the order" that cantaloupes not be shipped out of the State in bulk is plainly refuted by many provisions of the statute, among them that which prescribes that "all cantaloupes shall be packed in . . . closed standard containers approved by the supervisor. . . ." A.R.S. § 3-503 C.

The announced intention of the appellee to pack its Arizona grown cantaloupes in California — a state which also has a Standardization Act — does not make the Arizona Act unconstitutional. From the legitimacy of Arizona's interest in prescribing standards of quality and pack for Arizona grown produce, it follows inexorably that Arizona has the right to enforce those standards through its own inspectors. Moreover, the standards of the Arizona and California Acts are not the same.

ARGUMENT

I

The Packing of Fruits and Vegetables Does Not Involve "Interstate Commerce" in the Present Context.

It is important to note at the outset that under the decisions of this Court, "interstate commerce" means different things in different contexts.

For example, no one would question that Congress could, under its commerce clause powers, subject the packing of fruits and vegetables for shipment in interstate commerce to wage-and-hour, safety, or other regulation.[6] Indeed, Congress could, if it so elected, enact under its commerce clause powers the same type of regulation involved in this case. It does not follow, however, that State regulation of the packing of fruits and vegetables — in the absence of congressional legislation — is regulation which can be called into constitutional question on the ground that "interstate commerce" is involved. Indeed, the relevant authorities hold that state regulation imposed at the various stages of preparation of agricultural products for shipment in interstate commerce, prior to the time that these products actually move in interstate commerce, is not subject to constitutional scrutiny. We proceed to a discussion of those cases.

Federal Compress and Warehouse Co. v. McLean, 291 U.S. 17 (1934), upheld the constitutionality of a tax imposed by the State of Mississippi upon a cotton warehouse and compress business located within that State. According to stipulated facts, cotton was purchased within Mississippi for resale or to fulfill contracts for sale outside of Mississippi. After the cotton was purchased and ginned, it was transported to the appellant's warehouse for storage,

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[6] The appellee in the Motion to Dismiss, for example, emphasizes the fact that the National Labor Relations Board has jurisdiction over the packing process. The obvious difference is that the jurisdiction of the Labor Board is based upon affirmative congressional action. The principle of *McLean, Chassaniol* and *Parker v. Brown* applies in those instances where Congress has not acted.

whereupon negotiable warehouse receipts were issued to the owners of the cotton.

The sequence of events occurring after the cotton was stored in the warehouse is of great significance for purposes of the present issue. After the holders of the warehouse receipts had given orders to the warehouse company to ship the cotton, the cotton was compressed. The compression process was a process which occurred only after shipping orders had been received, the purpose of compression being to prepare the cotton for shipment. All except a negligible part of the cotton was shipped to points outside the state. In the language of the Court:

> Upon shipping orders given by the holders of the warehouse receipts, appellant compresses the cotton into bales of standard weight and size, suitable for shipment, and delivers them to the rail carrier for interstate transportation. 291 U.S. at 20.

The appellants argued that the tax upon the business both of warehousing and of compressing the cotton was a forbidden burden upon interstate commerce. In rejecting that contention, this Court held that of the overall continuum of events which eventually culminated in interstate sale, the compression and warehousing stages did not involve interstate commerce so as to bring into play the question of the constitutionality of the state regulation. The Court's opinion states as follows:

> A nondiscriminatory tax upon the business of storing and compressing the cotton, which is not itself the subject of a movement in interstate commerce, is not forbidden. *Most articles, before their shipment in interstate commerce, have had work done upon them which adapts them to the needs of commerce and prepares them for safe and convenient transportation, but that fact has never been thought to immunize from local taxation either the articles themselves or those who have manufactured or otherwise prepared them for interstate transportation.* (Citing cases) Here the privilege taxed is exercised before interstate commerce begins; hence the burden of the tax upon the commerce is too indirect and remote to transgress constitutional limitations. See Nashville, Chattanooga & St. Louis Railway Co. v. Wallace, 288 U. S. 249, 53 S.Ct. 345, 77

L. Ed. 730. The case, therefore, stands on a footing different from those in which local regulations of the business of purchasing a commodity within and shipping it without the state have been deemed to impede or embarrass interstate commerce in those commodities. Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239; Lemke v. Farmers' Grain Co., 258 U.S. 50, 42 S.Ct. 244, 66 L.Ed. 458. 291 U.S. at 21-22. (Emphasis added)

The same problem dealt with by Mr. Justice Stone in the *McLean* case was also the subject of a unanimous opinion authored for the Court by Mr. Justice Brandeis one month later in *Chassaniol v. City of Greenwood, Miss.*, 291 U.S. 584 (1934), a case involving the same basic fact situation as *McLean.* The *Chassaniol* opinion states as follows:

> Chassaniol contends that all the cotton is in interstate or foreign commerce from the moment it leaves the gin for Greenwood, or at least from the moment it is purchased at Greenwood by the buyer. The argument is that already at that time the cotton is destined for ultimate shipment to some other state or country; and that to tax the occupation of the cotton buyer burdens interstate commerce, since the buyer at Greenwood is the instrumentality by which the interstate transaction is initiated. The business involved is substantially like that described in Federal Compress & Warehouse Co. v. McLean; and the rule there declared must govern here. *Ginning cotton, transporting it to Greenwood, and warehousing, buying, and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississipi, a transaction in intrastate commerce.* Hence those engaged in performing any such local function may be subjected to an occupation tax, just as the property used, or processed, by them may be subjected to a property tax.
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> 291 U.S. at 586-587. (Emphasis added)

The fact of central importance in the *McLean* and *Chassaniol* holdings is that the cotton involved in those cases was compressed only *after* shipping orders had been received. Compression was the only function remaining to be performed prior to interstate ship-

ment. Nevertheless, those cases unanimously upheld the tax upon both the warehousing function and also the compressing function. The basis of those decisions was that neither warehousing nor compression was insulated from state regulation by the commerce clause because, "ginning cotton, transporting it to Greenwood, and warehousing, buying, *and compressing it there,* are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce." *Chassaniol v. City of Greenwood,* 291 U.S. at 587. (Emphasis added.) Under these facts this Court held that "the privilege taxed is exercised before interstate commerce begins." *Federal Compress and Warehouse Co. v. McLean,* 291 U.S. at 22.

Whether cantaloupes have a shorter or longer storage period than cotton is therefore immaterial, since the compression involved in *McLean* and *Chassaniol* occurred only after shipping orders had been received. By that time they were already bound for interstate shipment, compression being the only remaining pre-shipment process.

It is respectfully submitted that *Shafer v. Farmers Grain Co.,* 268 U.S. 189 (1925), and *Lemke v. Farmers Grain Co.,* 258 U.S. 50 (1922), are not inconsistent with this Court's holdings in *McLean* and *Chassaniol.* The regulation in *Shafer* and *Lemke* occurred at a time when there was no pre-shipment processing to be performed. This Court in *Parker v. Brown* distinguished *Lemke* and *Shafer* from *Chassaniol* on that basis:

> The Court [in Lemke and Shafer] was of opinion that the purchase of the wheat for shipment out of the state *without resale or processing* was a part of the interstate commerce. Compare Chassaniol v. Greenwood, supra. *Parker v Brown,* 317 U.S. at 361-362. (Emphasis added.)

However, if there is any inconsistency between *Lemke* and *Shafer,* on the one hand, and *McLean, Chassaniol,* and *Parker v. Brown,* on the other, the latter must prevail since they were later in time.

In the instant case, as in *McLean* and *Chassaniol*, the regulation has its first and final impact at a processing stage prior to shipment. It follows that in the absence of any contravening Federal statute — and there is none in this case — the State of Arizona is free to implement the regulation of its fruits and vegetables at the packing stage free from commerce clause strictures.

The appellee's contention in the Motion to Dismiss that the regulation here at issue prevents interstate movement itself, rests upon bootstrap logic. The interstate movement to which the appellee refers is necessarily that of the cantaloupes which do not meet the quality and packing standards of the Act. Such cantaloupes are prevented from moving in interstate commerce solely because of the fact that they do not meet the necessary standards, and the appellee presumes the completion of the shipment of such produce as a predicate to its contention that Arizona is preventing interstate movement. If carried out according to its intent, Arizona's standardization program will intercept substandard produce before it ever leaves the State. Under *McLean*, *Chassaniol*, and *Parker v. Brown*, such regulation occurs prior to the beginning of the interstate journey and is not subject to commerce clause invalidation.

II

The Burden on Interstate Commerce, If Any, Is Not Unreasonable

The dispute in this case fits a familiar pattern; a program adopted by a State Legislature pursuant to a legitimate state objective is objected to by one of the regulated corporations on the asserted ground that the program has an ancillary impeding effect to one degree or another on the flow of commerce across state lines.

It does not suffice — even if it were true — for the appellee simply to assert that Arizona's standardization laws constitute an impediment to interstate commerce because the fruits and

vegetables ultimately move in interstate commerce. It is beyond dispute that Congress could, if it elected to do so, enact a statute prohibiting Arizona or any other state from requiring fruits and vegetables shipped outside the state to meet certain standards. The fact is that Congress has not done so. The broad discretion vested in the states in the absence of prohibiting or inconsistent Federal legislation has been summarized by this Court as follows:

> Ever since Willson v. Black Bird Creek Marsh Co., 2 Pet. 245, 7 L.Ed. 412, and Cooley v. Board of Port Wardens, 12 How. 299, 13 L.Ed. 996, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character, and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints. *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 185 (1938).

The enacting Legislature declared the purpose of Arizona's Fruit and Vegetable Standardization Act to be as follows:

> To promote the development of the Arizona fruit and vegetable industry, to prevent fraud and deception in the receiving, packing, marking, shipping, consignment, sale, and accounting of sales of fruits and vegetables for interstate and foreign commerce, there are hereby established certain standards and certain standard containers for various fruits and vegetables. . . . 1929 Session Laws of Arizona, Chap. 95, Sec. 2, p. 307.

With regard to cantaloupes, the architects of Arizona's Fruit and Vegetable Standardization Act have made certain fundamental policy determinations. Among these determinations are the following:

(1) Of the various quality defects proscribed by A.R.S. § 3-503 A, "not more than ten per cent, by count, of the cantaloupes ***in any one container*** may be below the [specified] requirements, but not to exceed one-half of this tolerance shall be allowed for any one cause." A.R.S. § 3-503 A (Emphasis added).

(2) "Cantaloupes *packed in the standard containers* shall be fairly uniform in size." *Ibid.* (Emphasis added.)

(3) "All cantaloupes *in each container* shall be of one variety or of similar varietal characteristics." *Ibid.* (Emphasis added).

(4) Containers of cantaloupes must disclose in plain sight and in plain letters the name and the address of the packer. A.R.S. § 3-503 C. An obvious purpose of this requirement is to assure that Arizona produce packed under the standards of the Arizona Act will be identified as Arizona produce.

(5) "All cantaloupes shall be packed in regular compact arrangement *in closed standard containers approved by the supervisor. . . .*" *Ibid.* (Emphasis added.)

(6) No container of cantaloupes may be so arranged as to constitute a deceptive pack, that is so that the outer layers are "so superior in quality, size or condition" to the unexposed cantaloupes as to "materially misrepresent the entire content." A.R.S. §§ 3-481 8, and 3-522 B 2.

Enforcement of every one of the foregoing provisions of the Act would be impossible unless the inspector can inspect the cantaloupes in the pack. If the appellee is permitted to ship its cantaloupes in bulk into the State of California, the appellant would be powerless to require that the cantaloupes be identified as Arizona cantaloupes.[7] Similarly, unless they can inspect the cantaloupes in the pack, there is no way that the Arizona inspectors can determine whether cantaloupes packed in each standard container are uniform in size, color or variety, whether the higher quality fruit has been placed in the exposed portion of the container so as to materially misrepresent the content of the entire carton; or whether they have been packed in regular compact arrangement in closed standard containers approved by the supervisor.

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[7] In fact, they would not be identified as Arizona cantaloupes, but would bear the name and address of their California packer. California Agricultural Code, Section 45691.

The lower court, therefore, clearly erred in stating that "a reading of the Act reveals no clear basis nor authority for the issuance of the order by the defendant. . . ." Appendix 62.

Even as to quality, *e.g.*, the requirement that the cantaloupes must be "mature but not overripe, fairly well netted, and free from mold, decay and insect damage which has penetrated or damaged the edible portion of the cantaloupe, and free from serious damage due to bruises, sunburn, growth cracks, cuts, sponginess, flabbiness, wilting or other causes" the inspector has no way of knowing which cantaloupes the shipper proposes to pack and sell until the shipper has sorted the culls from the good fruit.

At all turns, therefore, inspection of the pack is indispensable to carrying out the purposes of the Standardization Act. It is immaterial to the appellant when or where the cantaloupes are packed as long as the supervisor can insure that the Arizona Standardization Act is complied with.

The necessity of a packing shed comes into the picture, not because of any requirement of the appellant or of State law, but solely because of the fact that cantaloupes, unlike certain other fruits and vegetables, can be sorted and packed only in a packing shed, according to the appellee's agent. Gipe Deposition, 10/8-13. It is immaterial to the appellant whether the appellee packs its cantaloupes in or out of a packing shed. The appellant's sole concern is that they must be packed in "closed standard containers approved by the supervisor," and that other standards prescribed by the Act must also be met.

The appellee's persistent contention that the appellant is attempting to force it to construct a packing shed in the State of Arizona is, therefore, without merit. The appellant is merely enforcing the requirement that the fruit be packed in standard containers according to the prescribed standards. The necessity of a packing shed does not rest upon the appellant's order, but rather on the inability of the appellee to sort and pack except in a packing shed.

The appellee's statement in its Motion to Dismiss that "appellant is already carrying out inspections in the field . . ." (Motion to Dismiss, p. 36) is misleading. The sole inspection which is carried out in the field is a pickleworm inspection. Appendix 38. It is not an inspection for the purpose of determining compliance with requirements of the Standardization Act; for reasons set forth above, such an inspection in the field is impossible. The sole purpose of the inspection in the field is to determine the presence or absence of pickleworm.

We turn now to a discussion of the decisions of this Court which are relevant to the present problem.

(A) Relevant Authorities and General Principles Established by Those Authorities.

In the absence of contradicting Congressional legislation, the principles governing commerce clause constitutionality of State regulations are basically two. They are:

(1) A distinction is to be drawn between state programs which, by their nature, demand uniformity and those which permit diversity among the different states.

(2) The states are to be given a broad leeway in effectuating the purposes of legitimate state goals. If the challenged program falls within the sphere of state governmental powers, and if the state could reasonably conclude that the program would contribute toward achievement of the state objective, then its constitutionality must be upheld.

The foregoing principles are illustrated by *Cooley v. Board of Wardens of the Port of Philadelphia,* 12 How. 298 (1851), and *South Carolina State Highway Dept. v. Barnwell Bros.,* 303 U.S. 177 (1938).

Involved in *Cooley* was the constitutionality of a state law requiring pilots for certain types of vessels, and setting qualification standards for such pilots. This Court determined that regulation of the qualifications of pilots constitutes a regulation of navigation and therefore a regulation of commerce. Nevertheless, the

Court held the regulation constitutional, on the basis of the following landmark principle:

> Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation. 12 How. at 319.

In *Barnwell,* this Court upheld the constitutionality of a South Carolina statute prohibiting trucks and semi-trailer trucks over 90 inches in width and whose total loaded weight exceeded 20,000 pounds from using the State highways. This Court's holding is especially significant in light of the unchallenged findings of the three judge district court which had held the statute unconstitutional.

The trial court found that ". . . there is a large amount of motortruck traffic passing interstate in the southeastern part of the United States, which would normally pass over the highways of South Carolina, but which will be barred from the state by the challenged restrictions if enforced. . . ." 303 U.S. at 182. It also found that ". . . from 85 to 90 per cent of the motortrucks used in interstate transportation are 96 inches wide and of a gross weight, when loaded, of more than 10 tons; that only four other states prescribe a gross loaded weight as low as 20,000 pounds; and that the American Association of State Highway Officials and the National Conference on Street and Highway Safety in the Department of Commerce have recommended for adoption weight and width limitations in which weight is limited to axle loads of 16,000 to 18,000 pounds and width is limited to 96 inches." 303 U.S. at 182-183. The trial court ". . . found in detail that compliance with the weight and width limitations demanded by the South Carolina Act would seriously impede motortruck traffic passing to and through the state and increase its costs; . . ." 303 U.S. at 183, and that most of the state highways were capable of handling the wider and heavier traffic. The district court

also found that ". . . the gross weight of vehicles is not a factor to be considered in the preservation of concrete highways, but that the appropriate factor to be considered is wheel or axle weight . . ." *Ibid.*

Finally, the district court exempted from its injunction decree the operation of trucks on highways "not constructed with sufficient strength to support the heavy trucks or modern traffic or too narow to accommodate such traffic safely." 303 U.S. at 182.

This Court reversed the district court's holding that the statute was unconstitutional. Significantly, this Court did not reject any of the findings set forth above. Rather it overturned the lower court's ruling pertaining to restrictions imposed upon state regulations by the commerce clause. The test, as laid down by Mr. Justice Stone in a unanimous opinion for the Court is as follows:

> Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial, function, to be performed in the light of the congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. *In the absence of such legislation the judicial function, under the commerce clause, Const. art. 1, § 8, cl. 3, as well as the Fourteenth Amendment, stops with the inquiry whether the state Legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought.* Sproles v. Binford, supra; Stephenson v. Binford, 287 U.S. 251, 272, 53 S. Ct. 181, 187, 77 L.Ed. 288, 87 A.L.R. 721. 303 U.S. at 189-190. (Emphasis added.)

* * * * *

Since the adoption of one weight or width regulation, rather than another, is a legislative, not a judicial, choice, its constitutionality is not to be determined by weighing in the judicial

scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard. Cf.Worcester County Trust Co. v. Riley, 302 U.S. 292, 58 S.Ct. 185, 82 L.Ed. 268. *Being a legislative judgment it is presumed to be supported by facts known to the Legislature unless facts judicially known or proved preclude that possibility.* Hence, in reviewing the present determination, we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record *whether it is possible to say that the legislative choice is without rational basis.* Standard Oil Co. v. Marysville, supra; Borden's Farm Products Co. v. Ten Eyck, 297 U.S. 251, 263, 56 S.Ct. 453, 456, 80 L.Ed. 669; Id., D.C., 11 F. Supp. 599, 600.

303 U.S. at 191-192. (Emphasis added.)

Cases in which state schemes have been invalidated on commerce clause grounds are further illustrative of the great latitude allowed to the states in implementing their police power programs. *Southern Pacific Company v. Arizona,* 325 U.S. 761 (1945), invalidated Arizona's Train Limit Law, limiting passenger trains to fourteen cars and freight trains to seventy cars. At the time of the decision, approximately 93% of the freight traffic and 95% of the passenger train traffic in Arizona was interstate. The Train Limit Law required the Southern Pacific Company to operate over 30% more trains in Arizona than would otherwise have been necessary, the additional costs amounting to about $1 million a year. The effect of the law was frequently to control traffic all the way from Los Angeles to El Paso because of the unfeasibility of changing trains at the State lines. The additional cost, however, was not the controlling factor. The trial court had concluded that "the train length limitation increased rather than diminished the number of accidents." 325 U.S. at 778. This Court agreed with the trial court, observing that as a safety measure the Arizona law "affords at most, slight and dubious advantage, if any, over unregulated train lengths, because it results in an increase in the number of trains and train operations. . . ." 325 U.S. at 779.

Similarly, in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), this Court held unconstitutional a unique Illinois statute requiring the use of a contoured mudguard on trucks and trailers. The statute was held unconstitutional only because of the massive showing of burden on interstate commerce which was made, and because the Court concluded that the contoured flaps did not represent an improvement, but rather a step backward from the safety standpoint. The burden on interstate commerce was exceptionally severe because of the difficulty of changing over to comply with the requirements of different states. Arkansas, for example, required the standard mud flaps, and there was a significant amount of truck traffic between Arkansas and Illinois. The problem was further compounded by "interline operations" which involved loaded trailers originating in one state being transferred to the tractors of another line.

Thus, in both *Bibb* and *Southern Pacific*, the Court concluded in effect that the state statute either did not achieve its intended purpose or actually represented a step backward. Even in those cases, however, the Court was very careful to accentuate the heavy presumption in favor of the constitutionality of the state statute. In the language of *Bibb:*

> These safety measures carry a strong presumption of validity when challenged in court. If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective. Policy decisions are for the state legislature, absent federal entry into the field. Unless we can conclude on the whole record that "the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it" (Southern Pacific Co. v. State of Arizona, supra, 325 U.S. at pages 775-776) we must uphold the statute. 359 U.S. at page 524.

There is a further suggestion in the majority opinion in *Southern Pacific* that the fact that interstate railroads were involved

may have affected that decision. *Barnwell* was distinguished as follows:

> *South Carolina State Highway Dept. v. Barnwell Bros., supra,* was concerned with the power of the state to regulate the weight and width of motor cars passing interstate over its highways, a legislative field over which the state has a far more extensive control than over interstate railroads. 325 U.S. at 783.

The foregoing distinction is consistent with the basic rule laid down by *Cooley* that some matters by nature demand uniformity, whereas others permit diversity. Highways maintained by the state — the Court appears to have reasoned in *Southern Pacific* — do not so "imperatively demand a single uniform rule" as do interstate railroads. The setting of standards for produce which is shipped out of the state would seem to permit diversity even more than regulations dealing with either highways or railroads. Various factors, such as the types and times of harvest, the economic conditions of the area, the climate, the types of local insects and diseases, the susceptibility of the produce to deterioration in shipment, and numerous other variables make diversity of regulation not only permissible but preferable. Standardization by its very nature is better implemented by permitting individual states to enact and carry out those rules and procedures which are best adapted to their particularized situation.

From a functional standpoint, the issue of uniformity versus diversity requires an inquiry into whether there is any adverse impact upon interstate commerce resulting from the fact that different states may enact different laws pertaining to fruit and vegetable standardization. Unlike the mud guard requirements in *Bibb,* the weight and width restrictions in *Barnwell,* and the train length limitations in *Southern Pacific,* the *differences* between the instant law and the laws of sister states are not themselves impediments to commerce. In *Bibb, Barnwell* and *Southern Pacific,* interstate shippers found themselves obligated, upon entering the state at issue, to go to great expense and trouble solely

because of the differences in state laws. Interstate truckers, for example, upon entering the State of Illinois prior to the *Bibb* case, had to install new mud guards. In *Barnwell,* interstate truckers, upon reaching the South Carolina state line, found themselves obligated either to reload their cargo onto other trailers or go around the State of South Carolina. And in *Southern Pacific,* interstate railroads had to shorten the size of their passenger and freight trains at El Paso and Los Angeles because of the *differences* between the Arizona law and the laws of its sister states.

The Arizona Fruit and Vegetable Standardization Act, by contrast, has its first and final impact on goods which originate within this State before they ever enter any other state. Once these goods cross a state line, there is no further impediment to their interstate journey because of any differences in standardization laws.

The instant case is therefore the clearest possible example of a case which falls on the permissible side of the *Cooley* dividing line: There is no adverse impact whatever upon interstate commerce as a result of *differences* between Arizona's standardization laws and the standardization laws of other states. By the time Arizona fruits and vegetables become a part of the flow of interstate commerce, they do so completely free from any regulation under the Act at issue.

The appellee will doubtless contend, as it has contended throughout these proceedings, that this case is not governed by the principles of *Cooley, Barnwell,* and others, because it is not a safety regulation, and that it affects only produce going out of the state rather than coming into the state. This argument is foreclosed by this Court's holdings in *Sligh v. Kirkwood,* 237 U.S. 52 (1915), and *Pacific States Box & Basket Co. v. White,* 296 U.S. 176 (1935).

Sligh v. Kirkwood, 237 U.S. 52 (1915), upheld the constitutionality of a Florida statute making it unlawful for anyone to

sell, offer for sale, ship or deliver for shipment, any citrus fruits which were immature or otherwise unfit for human consumption. In dealing with the issue of the scope of state police powers, the Court quoted from *Eubank v. Richmond,* 226 U.S. 137 (1912), "It [the state police power] extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity." 226 U.S. at 142.

It was contended in the *Sligh* case — as the appellee has contended in this case — that the regulation of fruits which were destined for sale in states other than the State of Florida was not a legitimate concern of the State of Florida and not properly within its police powers. This Court's opinion refuting that contention states as follows:

> We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the state of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive market. The shipment of fruits so immature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of such business within the state. *The protection of the state's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose.* 237 U.S. at 61-62. (Emphasis added)

We submit that the foregoing language from the *Sligh* opinion, and the holding of that case, are completely dispositive of the same issues in the instant case. If Florida, in 1915 — in the interest of maintaining the reputation of its citrus industry as a whole — can prevent the shipment of immature citrus fruits in interstate commerce, then Arizona, in 1968, can surely prescribe standards of quality, appearance, packing and marketability for cantaloupes to be shipped in interstate commerce, and can prevent

any cantaloupes from leaving this State which do not comply with those standards. The objective of the two Acts is precisely the same, and both fall within the area of state competence to regulate.

Involved in the *Pacific States Box & Basket Co.* case was an Oregon statute entitled "Standard Containers for Fruits and Vegetables." That statute vested in the State Director of Agriculture the power "to fix and promulgate official standards for containers of horticultural products, 'in order to promote, protect, further and develop the horticultural interests' of the state. 296 U.S. at 178. The statute further provided that after a standard container had been prescribed, it was unlawful for anyone "to pack for sale or transport for sale, or sell, the article in a container unless it conforms to the standard." 296 U.S. at 179. The order at issue in that case prescribed that strawberries and raspberries be packed only in certain containers known as "hallocks." The plaintiff manufactured a type of container other than a hallock, and challenged the constitutionality of the statute on commerce clause and other grounds. This Court, in a unanimous opinion written by Mr. Justice Brandeis, upheld the constitutionality of the statute. The following quotations taken from Mr. Justice Brandeis' opinion clearly establish the legitimacy of state standardization acts:

> The power of a state to prescribe standard containers in order to facilitate trading, to preserve the condition of the merchandise, to protect buyers from deception, or to prevent unfair competition, is conceded. Such regulation of trade is a part of the inspection laws; was among the earliest exertions of the police power in America; has been persistent; and has been widely applied to merchandise commonly sold in containers. See Turner v. Maryland, 107 U.S. 38, 51-54. Latterly, with the broadening of the field of distribution and the growing use of containers in the retail trade, the scope of the regulation has been much extended. 296 U.S. at 181.
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> * * * * *
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> Whether it was necessary in Oregon to provide a standard container for raspberries and strawberries; and, if so, whether

> that adopted should have been made mandatory, involve questions of fact and of policy, the determination of which rests in the legislative branch of the state government. The determination may be made, if the Constitution of the state permits, by a subordinate administrative body. With the wisdom of such a regulation we have, of course, no concern. We may inquire only whether it is arbitrary or capricious. That the requirement is not arbitrary or capricious seems clear. That the type of container prescribed by Oregon is an appropriate means for attaining permissible ends cannot be doubted. *Id.* at 182.

The propriety of Arizona's interest in prescribing standards of quality and pack for Arizona produce is therefore clear. Moreover, the other factor to be taken into consideration — asserted burden on interstate commerce — is, upon analysis, either very slight or non-existent.

The most that the appellee has ever contended is that compliance with the requirement that cantaloupes be shipped only in closed standard containers approved by the supervisor will impose upon it an additional cost: the cost of constructing or otherwise acquiring the use of a packing shed.

Where, as here, the sole consequence of enforcement of a state statute will be that a profit-making corporation is put to greater expense, this expense alone is never sufficient to invalidate the statute. In *Bibb v. Navajo Freight Lines, Inc.*, for example, the Court said:

> These findings on costs and on safety are not the end of our problem. Local regulation of the weight of trucks using the highways upheld in Sproles v. Binford, supra, also involved increased financial burdens for interstate carriers. 359 U.S. at 525.

The appellee has also contended that application of the Act prevents consolidation of certain packing functions, but at most this argument is only a contention that additional costs may be involved.

The appellee has confused the issue of burden on interstate commerce with an asserted burden on a profit-making corpora-

tion. There is no suggestion, nor could there be, that Bruce Church, Inc. will discontinue its Parker operations if it is required to conform to the provisions of the Standardization Act. There are at the present time in the Parker area two companies, the Garin Company and the Tri-Produce Company, which grow and harvest cantaloupe acreages comparable in size and quality to those of the appellee. Both of these companies have operations in California as well as Arizona, and both pack their cantaloupes subject to inspection and supervision by Arizona standardization officers. See Appendix, 34-35. If it is feasible for these companies to pack their Arizona-grown produce subject to the requirements of the Arizona Standardization Act, it will also be feasible for the appellee to do so. Therefore, the sole burden will be a burden on the appellee, and not on interstate commerce; all of the produce which meets the standards of the Act will be shipped to whatever points the appellee desires to ship it.

Even if additional cost to the regulated corporation were relevant, the economic impact to the appellee is minimal. At most, the plaintiff will have to spend $200,000.00 to build a packing shed. This is only about 1/17th of the capital expenditure which the plaintiff has already made at its Parker operation; less than 1/3rd the value of one single crop — cantaloupes — for one single year at Parker; and only 2/3rds of the *net profit* anticipated by the appellee from one cantaloupe crop for one year. See Appendix, 31-33, and Gipe Deposition, page 47.

Moreover, it is not as though enforcement of the standardization law would result in a net cost to Bruce Church, Inc. in the amount of $200,000.00. The packing shed facilities which the appellee has been using in Blythe, California, are leased facilities, and the lease expired in November of 1968. Appendix 47. The company's long-range plans, in any event, call for the construction of a packing shed, and the company has not yet decided whether it should be built in Arizona or California. Gipe Deposition, 54/9-55/5.

(B) Irrelevance of Baldwin v. Seelig Line of Cases.

The apparent root error underlying the lower court's holding was its assumption, shared by the appellee, that the instant case is governed not by *Sligh v. Kirkwood, Pacific States Box & Basket Co.,* and other cases which have dealt with the power of a state to prescribe standards of quality and pack for its produce, but by those cases which stand for the proposition that no state can wall itself off from competition from other states. *Baldwin v. Seelig,* 294 U.S. 511 (1935); *Toomer v. Witsell,* 334 U.S. 385 (1948); and *Johnson v. Haydel,* 278 U.S. 16 (1928).

The *Baldwin v. Seelig* line of cases clearly establishes that a state cannot, consistent with the commerce clause, isolate itself as an economic unit, preserving for itself any segment of business which arises within its borders. Were such the purpose of the Arizona Standardization Act, it would clearly be invalid. On the other hand, *Sligh v. Kirkwood* and *Pacific States Box & Basket Co.* establish with equal clarity that a state may set standards of quality and pack for produce grown and shipped from the state, in the interest of maintaining the long-range reputation of that produce.

The issue, then, is whether this Court will accept as the purpose of the statute that which was expressed by the enacting legislature in 1929, and has never been questioned since that time, and that which the parties to this action have stipulated; or whether this Court will ascribe to the Act an improper purpose which has foundation neither in the record in this case, nor in the history of the Act itself.

This is simply not a *Baldwin v. Seelig* type case. The legislature which enacted the Act at issue clearly declared that the purpose is:

> To promote the development of the Arizona fruit and vegetable industry in interstate and foreign markets; to establish standards and standard containers for certain fruits and vegetables; to prevent fraud and deception in the receiving, packing, marking; sale and accounting of sales of fruits and vege-

tables. . . ." Preamble to Chapter 95, HB 97, 8th Legislature, State of Arizona (1929), cited in 1929 Session Laws of Arizona, Chap. 95, p. 306.

The undisputed testimony on the record in this case concerning the purpose of the statute comes from two highly qualified sources. The parties have stipulated that one of the co-authors of the Act, Mr. O. D. Miller, if called to testify, would testify that the purposes of the Act were to promote and develop Arizona fruit and vegetables in interstate and foreign commerce and to enhance the return to producers of fruits and vegetables within this state. Appendix 27-28. The testimony of the appellant himself, Mr. L. J. Pike, is to the same effect. See Pike Deposition, pp. 10 and 11. In addition, the parties have stipulated that a primary purpose of the Standardization Act of Arizona and California was to prevent deceptive packs. Appendix 42-43.

By contrast, there is not one scintilla of evidence that the purpose of the Act was to preserve the packing business for Arizona. Nor could there be. The Act has been in existence for over 40 years. Its provisions extend not only to cantaloupes, but to a total of 37 agricultural products. The Act draws no distinction between those products which are packed in a packing shed and those which are not. The reason is readily apparent: the Act is totally unconcerned with the place where the produce is packed. The sole concern of the Act in this regard is that where standard containers are prescribed, the inspectors must be able to verify that standard containers have been used and that other statutory standards — uniformity of color and variety, non-deceptive packs, etc. — have been met.

There is therefore ample evidence that the underlying purpose of Arizona's Fruit and Vegetable Standardization Act is a proper one. There is absolutely no evidence to support the improper purpose which the appellee would have this Court ascribe to the Act. Moreover, it is well-settled that courts will not ascribe to legislation an improper, invalidating purpose in place of a proper purpose on which the legislature could reasonably have relied.

It is only where the stated, legitimate purpose is not a reasonable one, or is precluded by the proven facts, that courts will hold that the purpose was an improper one. As this Court held in *South Carolina v. Barnwell Bros.*:

> Being a legislative judgment it is presumed to be supported by facts known to the Lgeislature *unless facts judicially known or proved preclude that possibility.* 303 U.S. at 191. (Emphasis added.)

Similarly, just last term in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago R.I. & P.R. Co.,* 393 U.S. 129 (1968), this Court reversed a decision of the district court invalidating Arkansas' full crew laws, which specify minimum numbers of employees who must serve on train crews. The district court had held that the financial burden of compliance was "out of all proportion to the benefit, if any derived . . ." from enforcing the statute. This Court held as follows:

> We think it plain that in striking down the full-crew laws on this basis, the District Court indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the Commerce Clause." 393 U.S. at 136.

The district court in the instant case has also "indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the Commerce Clause." Although it is impossible to determine from the lower court's cryptic opinion the basis for its constitutional holding, it can be inferred from the court's citation of *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928), that the court agreed with the appellee concerning the purpose of the Standardization Act.

In *Haydel,* this Court declared unconstitutional a Louisiana statute prohibiting shipment out of the State of any shrimp from which the heads and hulls had not been removed. Louisiana contended that the purpose of the requirement was to preserve the hulls and heads for Louisiana use. There simply was no basis for this contention. This Court observed that "not more than half the hulls and heads removed in Louisiana is used for any

purpose. They have no market value, cannot be sold or given away, and often constitute a nuisance." 278 U.S. at 9. Under these circumstances, the only reasonable conclusion was that which the Court drew: "the conservation of hulls and heads is a feigned and not the real purpose." *Id.*, at 10.

Thus, the *Haydel* case came within the exception to the *Barnwell* rule: legislative judgments are "presumed to be supported by facts known to the legislature ***unless facts judicially known or proved preclude that possibility.***" 303 U.S. at 191. (Emphasis added.)

Subsequent decisions in which litigants have relied upon *Haydel* have made it very clear that that case has no applicability where the court can reasonably find a proper purpose for the statute at issue. For example, in ***Bayside Fish Flour Co. v. Gentry,*** 297 U.S. 422 (1936), this Court upheld a California statute requiring licenses for plants engaging in the processing of fish. The opinion observes that "Appellant places great reliance upon Foster Packing Co. v. Haydel. . . ." 279 U.S. at 426. In holding *Haydel* inapplicable, the Court stated as follows:

> If the enforcement of the act affects interstate or foreign commerce, that result is purely incidental, indirect, and beyond the purposes of the legislation. The provisions of the act assailed are well within the police power of the state, as frequently decided by this and other courts. *Ibid.*

The controlling fact in *Haydel* was the complete absence of any legitimate objective upon which the state regulation could be based. This Court therefore concluded that the real purpose was to immunize the Louisiana shrimp packing business from out-

of-state competition.[8] In the instant case the true objective of the statute — as revealed by the statutory history and the uncontradicted evidence in this case — is a legitimate objective. Any effect on interstate commerce is "purely incidental, indirect and beyond the purposes of the legislation." *Ibid.* It follows that the holdings in *Haydel* and similar cases are inapplicable.

(C) Irrelevance of Past Lapses in Enforcement of the Act.

The 1965 amendment of the Act prescribed that cantaloupes must be packed in standard containers approved by the supervisor. Since that time, over a period of three shipping seasons, 1965-1967, the appellant allowed a total of 1084 acres of cantaloupes to be shipped out of the State in bulk in violation of the Act. Appendix, 51. These violations should never have been allowed, and the appellant acknowledges that had he been properly advised, they would not have been allowed. In any event, whatever significance these past instances of failure to enforce the Act may hold for Arizona state officials and Arizona producers, they are totally irrelevant to the question of the continuing validity of the Act itself.

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[8] Unlike the situation in the Haydel case, there is in fact no separate packing industry which packs cantaloupes in the State of Arizona. The packing is done by the shippers themselves. There is, however, a local industry within the State of Arizona, which is very much concerned over the lower court's holding. Both before the lower court, and also before this Court, counsel for the Arizona Vegetable Growers Association (an industry association consisting of most of the vegetable and melon growers in Arizona) has been associated with the State Attorney General's office, at the expense of the Arizona Vegetable Growers Association, to defend the constitutionality and enforceability of the Fruit and Vegetable Standardization Act. The members of this Association are in the business of producing, shipping and marketing Arizona fruits and vegetables. They have seen the great benefits which have come to their industry over the years through the enforcement of minimum uniform standards of quality and pack provided by the Standardization Act, and they realize the great loss which their industry would suffer if these standards were no longer enforced. They fear a return to the situation existing prior to the Standardization Act, in which slipshod packing practices of a few had an adverse impact on the reputation of all Arizona produce.

This Court effectively held as recently as 1967 that the failure to enforce a statute — even where the enforcement failure is total and extends over a period of more than fifty years — does not affect the validity of the statute itself, nor does it lessen the future responsibility of officials charged with enforcement of the statute. *Lassen v. Arizona,* 385 U.S. 458 (1967). Involved in the *Lassen* case were certain provisions of the Arizona Enabling Act which prescribed procedures for the disposition of lands which had been conveyed by the United States to the State of Arizona in trust. The Arizona Supreme Court had held that the lands could be used for highway purposes without the trust being compensated for each parcel so used; that Court's opinion observed that the practice of using trust lands in this manner was of over fifty years' standing. *State v. Lassen,* 99 Ariz. 161, 407 P.2d 747 (1965). Before this Court, the respondent urged the significance of the fact that there had been a total failure to enforce, extending over a period of more than a half century. (See Respondent's Brief, *Lassen v. Arizona,* No. 84, OT 1966, pp. 17-21). This Court reversed, declaring that the Act required specific compensation for each parcel used for highway purposes. The opinion devoted only a passing footnote reference to the fact that there had been past enforcement failures. *Lassen v. Arizona,* 385 U.S. 458, f.n. 22 (1967).

Whatever significance past enforcement lapses may have for other purposes, they have no relevance to the question of the continuing validity of the Act. Such lapses are not total, as in the *Lassen* case, and they do not extend over nearly so long a period of time; their irrelevance follows *a fortiori* from the holding in *Lassen.* Shipments in violation of the Act have been comparatively small and, with the exception of the appellee, none have been by a major shipper.

(D) Relevant and Irrelevant Aspects of California's Fruit and Vegetable Standardization Act.

Virtually every important agricultural state in the nation, with the exception of Texas, has a standardization act of some kind.

Arizona's Standardization Act was patterned after the California Act, and the provisions of the two Acts are still similar. As discussed below, however, their standards differ in many respects.

The existence of standardization acts in California and other states is relevant because it demonstrates that Arizona is not alone in concluding that uniformity of pack and quality can enhance the reputation and competitive standing of a state's produce.

In the appellee's view, the California Fruit, Nut and Vegetable Standardization Act has another significance. The principal thrust of the appellee's argument before the lower court was that Arizona's interests would be vindicated because of the appellee's announced intention to pack its cantaloupes in California, whose standards — according to the appellee — are as high as or higher than the standards of the Arizona Act. The argument is not well taken for two reasons. First, the standards of the two Acts pertaining to cantaloupes are not the same. Even more important, it would seem elementary that Arizona is entitled to enforce its own law through its own inspectors, rather than being forced to rely upon the enforcement officers of a sister state, over whom it has no control.

(1) *Material Differences in the Two Acts.*

The acts of both states proscribe the shipment of cantaloupes with specified types of physical defects, such as mold, decay, and insect injury which has penetrated or damaged the edible portion of the cantaloupes. Compare A.R.S. § 3-503 A, with § 45601, California Agricultural Code. In addition, both statutes interdict cantaloupes which have been seriously damaged, and both define "serious damage." The term "serious damage," however, embraces a broader range of defects under the Arizona statute than under its California counterpart. The California statute provides that "damage to any one cantaloupe is not serious unless it affects the edible portion of the individual cantaloupe." California Agricultural Code, § 45601. The Arizona definition is broader: "Damage to any one cantaloupe is not serious unless it affects the

edible portion *or shipping quality of the individual cantaloupe or seriously detracts from the appearance thereof.*" A.R.S. § 3-503 A. (Emphasis added.)

The Arizona statute's extension of the serious damage proscription to those defects which affect the shipping quality or detract from the appearance of the individual cantaloupe is not surplusage. The parties have stipulated that there is a difference between physical defects, and defects which affect the appearance or shipping quality of produce. Stipulation No. XII, entered into between the parties, reads in part as follows:

> In addition to physical defects, such as softness, sponginess, rot, etc., some individual shippers may give greater emphasis than others to considerations such as *appearance and shipping qualities, which, though they are factors separate and apart from physical defects, affect the marketability of the produce.* Appendix, 36. (Emphasis added.)

(2) *Arizona's Interest in Enforcing Its Own Act.*

An indispensable concomitant to any state's right to enact standardization laws is the corollary right to enforce its laws through its own inspection officers. In this regard, the following considerations are pertinent:

(a) Even if the statutory standards were exactly the same, identical standardization practices would not necessarily result. Both the Arizona and the California laws are couched in quite general terms, such as "free from mold, decay and insect damage," "fairly well netted," "fairly uniform in size," etc. Substantial differences can result from the manner in which the inspection officers of the two states actually enforce these highly generalized standards. The appellant testified at his deposition that the enforcement of statutory standards by one group or another group of inspection officers can result in appreciable differences. Continued Deposition of L. J. Pike, 12/10-16. The parties have stipulated that within the bounds of the requirements of the Arizona and California Acts, some shippers go to greater lengths than others in sorting for color, and uniformity of size, and fol-

lowing similar procedures to ensure the shippers' long-run reputations. Appendix 36. It was further stipulated that:

> The manner in which an individual shipper packs and the manner in which he sorts for color, uniformity of size, and similar factors, has a substantial effect upon the long-run reputation that his produce attains with his buyers; this long-run reputation that the shipper's produce acquires is a matter of prime concern for a shipper such as the Bruce Church Company. This is one of the reasons why the Bruce Church Company would not even want its cantaloupes to be packed by any other company. Appendix 36.

We agree that it is within the province of different shippers to elect — in the interest of maintaining their long-run reputations — to place differing emphases on packing techniques and quality-ensuring procedures, and not to entrust such important matters to anyone else. By a parity of reasoning, it is within the prerogative of each state to enforce the standards of its own standardization laws through its own supervisor and its own inspectors, rather than being forced to rely on the inspection officers of another state over whom it has no control.

(b) The standards of the California fruit and vegetable standardization laws, and the practices and procedures which are followed in implementation thereof, are, of course, subject to change by the Legislature and by enforcement agencies of the State of California, over whom Arizona has no control. A rule which would make the validity of an Arizona law dependent upon its similarity to a California counterpart would subject enforcement of the Arizona law to the obligation to make continuous investigations into the contents of, and changes in, the California statutes, regulations, and enforcement practices. The obligation to conduct such an ongoing, moment-to-moment inquiry into the laws of another state as a precondition to the continuing constitutionality of this State's law is manifestly impractical and unworkable. In addition, it flies in the face of the fundamental principle laid down by *Cooley v. Board of Wardens*, 12 How. 298 (1851), that in those areas in which uniformity is not

required, each state is entitled to adopt its own individualized program.

(c) Arizona law requires that all containers of fruits and vegetables subject to the Act "shall bear in plain sight and in plain letters" the "name of the orchard or farm where the fruit or vegetable was produced." See A.R.S. § 3-499. Such a provision is, of course, in keeping with the general purpose of Arizona's standardization laws. There is no similar requirement in the California statutes. Indeed, crates of Arizona cantaloupes packed in California will bear a California address,[9] and a central object of the standardization laws will have been lost.

The cantaloupes which are at issue in this case provide an excellent example. It has been stipulated that "cantaloupes grown at Parker are considered ordinarily to be of a higher quality than those grown in other districts in Arizona." Appendix 41. It is within Arizona's legitimate interest to require that interstate cantaloupe purchasers be informed that this high quality Parker fruit was grown in Arizona.

In summary, it is within Arizona's constitutional authority to enact a standardization law for fruits and vegetables. It necessarily follows that Arizona has the authority to enforce that law. Enforcement and supervision can be accomplished only within the State of Arizona. It would indeed be a hollow right if Arizona is entitled to enact standardization laws, but must depend for their enforcement upon the enforcement officers of a sister state. The existence or non-existence and similarity or lack of similarity of a standardization law in California are therefore insufficient bases for the contention that Arizona may not enforce its own law through its own inspectors.

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[9] Section 45691 of California's Fruit, Nut & Vegetable Standardization Act provides as follows:

Packer's name and address.

Every container of cantaloupes shall bear upon it in plain sight and in plain letters on one outside end, the name of the person that first packed or authorized the packing of the cantaloupes, or the name under which such packer is engaged in business, together with a sufficiently explicit address to permit ready location of such packer.

CONCLUSION

Almost all states for whom the raising of fruits and vegetables constitutes an important industry have enacted some type of law prescribing minimum standards of quality and pack for produce shipped out of the state.[10] Arizona is one of those states.

The legitimacy of a state's interest in upgrading the quality, saleability, and reputation of the produce which is shipped from the state has been recognized by this Court for more than half

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[10]For examples of standardization acts of other states, see the following:
California—West's Annotated California Codes, Agricultural Code, Division 17.
Colorado—Colorado Revised Statutes (1963), Chapter 7.
Florida—Florida Statutes Annotated (1962), Title 33.
Idaho—Idaho Code (1968), Title 22.
Illinois—Smith-Hurd Illinois Annotated Statutes (1966), Chapter 5.
Indiana—Burns Indiana Statutes (1964), Title 15.
Iowa—Iowa Code (1949), Title 10.
Mississippi—Mississippi Code (1942), Title 19.
Montana—Revised Codes of Montana (1947), Title 3.
Nevada—Nevada Revised Statutes (1963), Title 51.
New Mexico—New Mexico Statutes (1953), Chapter 45.
Ohio—Page's Ohio Revised Code (1953), Title 9.
Oregon—Oregon Revised Statutes (1953), Title 49.
Tennessee—Tennessee Code (1954), Title 43.
Utah—Utah Code (1953), Title 4 and Title 5.
Washington—Revised Code of Washington (1962), Title 15.
Wyoming—Wyoming Statutes (1957), Title 11.

century. The Act here at issue is not inconsistent with any Congressional legislation. It is respectfully submitted that the judgment of the lower court should be reversed.

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